

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1082

In The
United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

ag. 'nst

ROBERT J. LANE,

Defendant-Appellant.

Appeal From Orders and Judgment of Conviction in the
United States District Court for the Western District of
New York

BRIEF FOR APPELLEE

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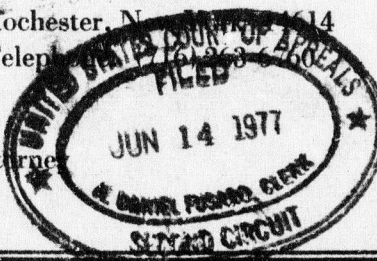
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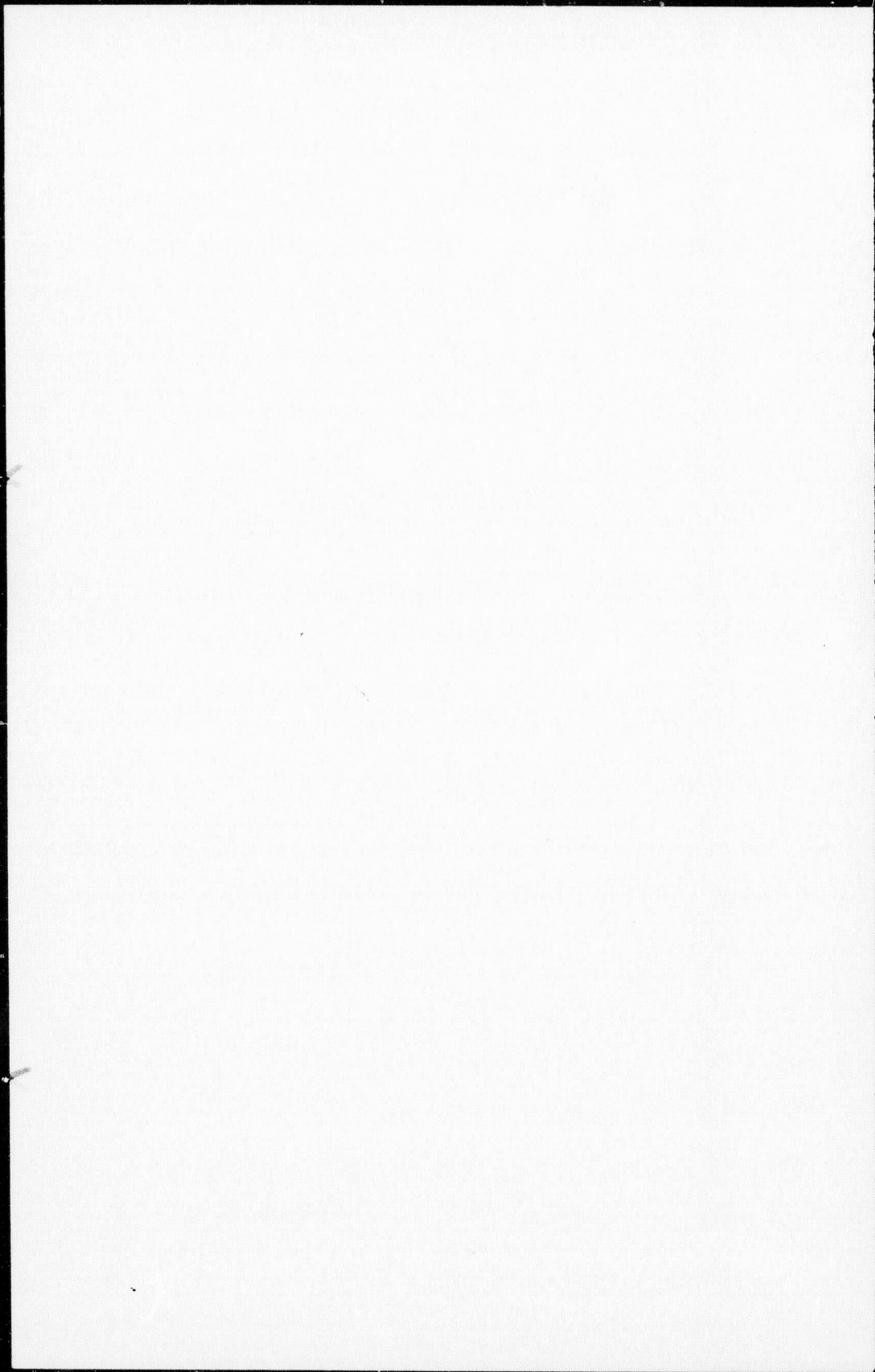


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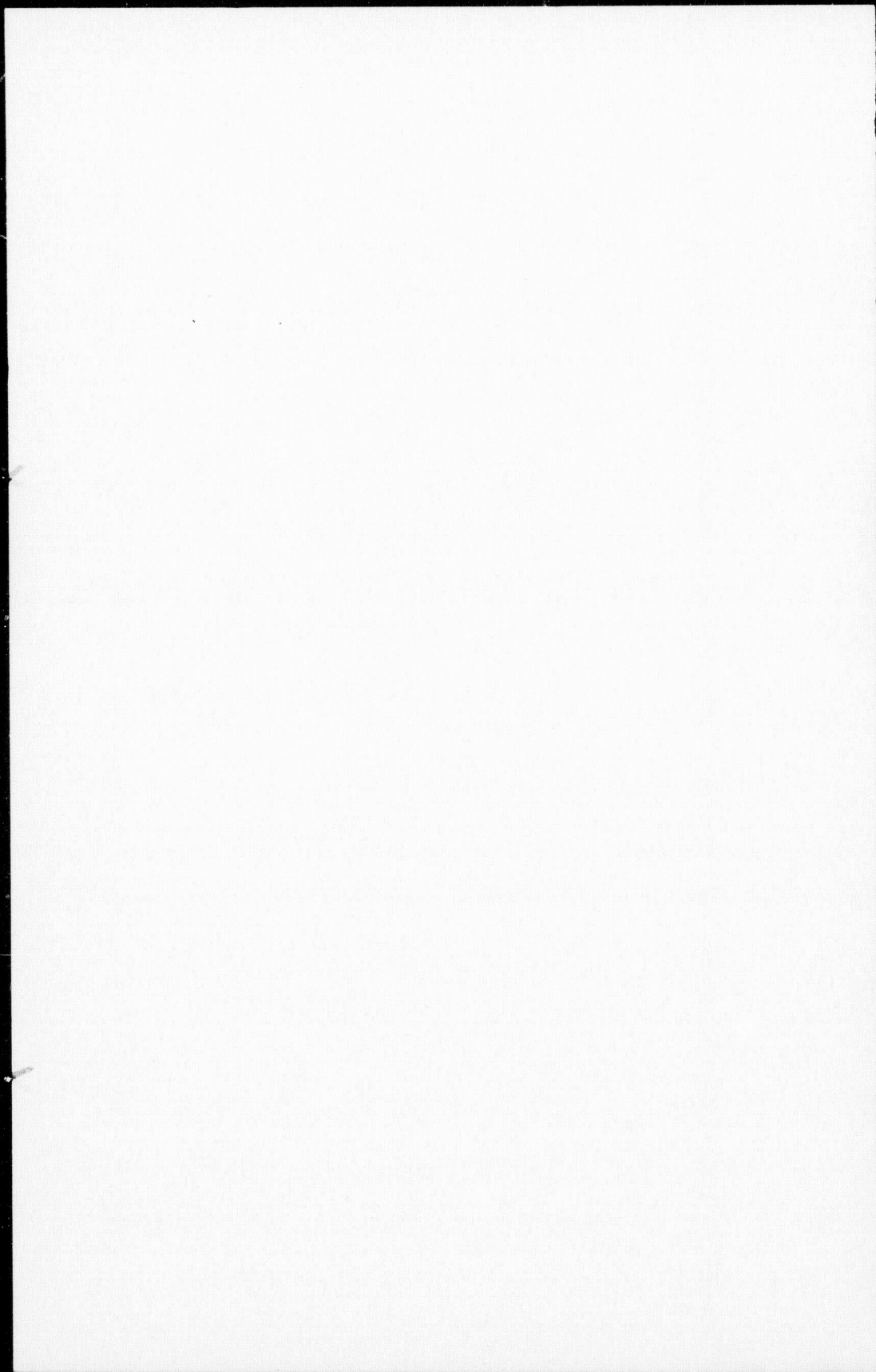
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UNITED STATES OF AMERICA,
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Defendant-Appellant.

Appeal From Orders and Judgment of Conviction in the
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BRIEF FOR APPELLEE

Counterstatement of the Case

On December 23, 1976, Robert J. Lane was convicted on three misdemeanor counts of wilfully failing to file his income tax returns for the years 1965, 1966 and 1967.

The jury trial began on December 21, 1976 and ten witnesses testified during the trial. On December 23, 1976 the jury returned its verdict of guilty on all three counts.

On January 24, 1977 the defendant was fined a total of \$2,000. No other sentence was imposed.

Issues Presented*

In the opinion of Appellee, the following issues are presented:

1. Whether compliance with the statute of limitations adequately preserves an individual's rights to due process and speedy trial under the Fifth and Sixth Amendments to the Constitution.

2. Whether an accused's Constitutional right to a speedy trial is violated where the Government made repeated requests for prompt trial; complied fully with the Speedy Trial Act; the Second Circuit and Western District Plans for the Prompt Disposition of Criminal Cases and where fourteen trial dates had been fixed, or offered, the Government never asked for a continuance, the defense repeatedly asked for continuances, but the actual trial was held four years and ten months after the indictment was returned.

Counterstatement of the Facts

Robert J. Lane, is an attorney admitted to practice in New York State in 1958. During the course of his career he worked as an associate attorney, Town attorney for the Town of Alden, Special Deputy Attorney General, and maintained his own office for the practice of law. (Tr. 132-135, App. 99-101).** From 1972 to 1966, Lane maintained two offices, one in the City of Buffalo and one in the Town of Alden. (Tr. 34, App. 53).

Robert Lane failed to timely file his Federal Income Tax returns for the years 1965, 1966 and 1967. (Tr. 7-8, App. 45-46). His gross income for 1965 was \$22,795; for 1966 was \$30,855.67 and for 1967 was \$35,940.38 (Tr. 8-10, App. 46-48).

*This case has not previously been before this Court.

**Tr. refers to the trial transcript; "App" refers to the Government's Appendix. "Appellant App." refers to the Appellant's Appendix. The numbers appearing after these references refer to the pages of these papers.

While the 1965 return was due on April 15, 1966, Lane was denied an extension to file and thus was given 10 days to file the returns until May 8, 1966 (Tr. 10, App. 48). This return was filed on October 29, 1968, one month after his initial interview with Ronald Kolb, Special Agent for I.R.S. Intelligence Division. Lane's 1966 return was due April 15, 1967 but due to a granted extension he had until June 1, 1967 to file this return (Tr. 10, App. 48). The 1966 return was filed on October 29, 1968, one month after his initial interview with Special Agent Kolb.

The 1967 return was due April 15, 1968 and after a denial of an extension, was required by May 3, 1968. The 1967 return was not filed until April 16, 1969. (Tr. 11, App. 49). The taxes due on these returns were paid on November 5, 1970. (Tr. 14-16, App. 50-52).

Pre-Indictment Facts

The Collection Division of the IRS began its investigation in February, 1967. According to Exhibit G-16 the initial contact was made on February 10, 1967 and Lane advised he was preparing his 1965 return and will send it in the next week. (App. 2). Subsequent attempts to contact Lane on October 12, 1967, October 24, 1967, May 13, 1968, May 23, 1968, June 14, 1968 were fruitless (App. 2). Although messages were left, no return calls were made to the Revenue Officer. (Tr. 45-46, App. 54-55). The case was referred to the Intelligence Division on August 8, 1968 after it was determined that Lane had not filed returns for three years. (Tr. 46, App. 55).

From September 20, 1968 through May 5, 1970 Special Agent Kolb had twelve meetings with Lane in an effort to verify the substance of his returns and his reasons for not filing. (Tr. 55-71, App. 56-72). On June 9, 1970 a formal meeting was held with Mr. Lane and his attorney, John Walsh. At this meeting Lane was advised that the investigation was nearing completion

and that they were contemplating a recommendation for prosecution for failure to file returns for 1965, 1966 and 1967. (Tr. 71-73, App. 72-74). On August 7, 1970 the investigation and report was forwarded to the I.R.S. Regional Counsel's Office and a subsequent interview was held at the request of Lane's attorney. (Tr. 73-74, App. 74-75). The taxes due were paid on November 5, 1970.

Mr. Lane, with his attorney, took advantage of all his rights to conferences throughout the investigation and after its completion up to and including the Washington conference on December 10, 1971. (App. 3-4).

The case was forwarded to the U.S. Attorney for the Western District of New York by letter dated January 10, 1972. (App. 3-4). The indictment was returned on February 17, 1972.

Post-Indictment Facts

Following arraignment on February 17, 1972, the two Buffalo District Court Judges (Curtin and Henderson, J.J.) felt it necessary to recuse themselves from the Lane case because they knew the defendant, a Buffalo attorney. (App. 5-6). The case was assigned to Harold P. Burke, District Court Judge in Rochester. (App. 6).

The defendant's attorney was Charles McDonough, a well-known Buffalo attorney with a very active trial practice. Mr. McDonough died on August 19, 1974 after a long illness. No substitution of attorney was made after Mr. McDonough's death. After the Government's motion September 10, 1974, Mr. Lane retained Attorney George Doyle to try his case. (App. 43). Mr. Doyle is a Buffalo attorney with an active trial practice.

Throughout the four years and ten months that followed arraignment, and before trial, the Government made repeated motions to fix a date for trial. Although the Government never requested a continuance, the defense repeatedly asked for

continuances such that 13 trial dates fixed or offered by the Court were not accepted.

The defense never made a motion to fix a trial date. Instead, it was repeatedly unable to proceed to trial for one reason or another. These continuances, along with normal (and some unexpected) institutional delays prevented the prompt trial of this case. Although the defense made two motions to dismiss based on a denial of speedy-trial rights, the first was made simultaneously with a request by the defendant for a continuance (October 14, 1975) (App. 43); the second made, for the record, on the eve of the actual trial. (App. 43).

Since the District Court Clerk's record fails to show the efforts by the Government in obtaining a prompt trial for the defendant, the Appendix submitted herewith is primarily composed of correspondence. The following "Statement of Significant Dates" has been reconstructed from various records in the Government's file and other records. Each of these records were available to the Appellant, but he has failed to include any in his brief or appendix to enlighten this Court as to the actual circumstances.

Statement of Significant Dates

Date	Action	Explanation
2/17/72	Date of Indictment, Arraignment and Referral to Rochester for trial.	The transcript shows the defendant was arraigned before Judge Henderson and both Henderson and Curtin, J.J. disqualified themselves. The case was transferred to Rochester.
3/22/72	Government's Motion for trial.	This motion was made 33 days after arraignment.
5/5/72	Motion to fix trial date returnable 5/22/72	On 5/22/72 there was no appearance for defendant and a trial date was set to follow docket number 1972-61.
following 1972-61	<i>Trial Date</i>	
5/23/72	Defendant requests Continuance	Letter from Charles McDonough dated May 24, 1972 to Judge Burke requests continuance until June 29, 1972 to make pre-trial motions. No discovery motions were ever made in this case.
7/28/72	Letter from Judge Burke to Charles McDonough	This letter definitely fixes a trial date to follow the <i>Adel</i> case to begin September 6, 1972.
8/8/72	Defendant requests continuance	Letter from McDonough to Judge Burke dated August 8, 1972 shows McDonough unable to proceed to trial on September 6, 1972 and requesting an October date.
9/6/72	<i>Trial Date</i>	
10/3/72	Letter to McDonough	In accordance with McDonough's letter of August 8, 1972 a trial date opportunity was set for October 10 or 11 as shown by the letter from AUSA Philip Abramowitz to McDonough dated October 3, 1972.
10/10/72	<i>Trial Date</i>	Although there is no letter specifically referring to the defendant's request for a continuance, it appears from a letter to Judge Burke dated October 30, 1972 that Mc-

Donough was on trial on this date and therefore unable to go to trial. A new date was set for November 6, 1972.

10/30/72	Letter from McDonough	This letter requests a continuance by the defendant again because of a conflict of trials with another court. The situation is resolved through a series of letters dated October 31, 1972 November 1, 1972
11/6/72	<i>Trial Date</i>	Defendant requested a continuance again as is shown by the previous entry here.
12/20/72	Letter from U.S. Attorney.	This letter outlines the difficulty we have had in getting a trial in <i>U.S. v. Lane</i> and requesting a trial in early January 1973. This letter also indicated the Government's readiness for trial.
1/2/73	<i>Trial Date?</i>	There is some question whether this date was fixed or how the problems set forth in the December 20, 1972 letter were resolved.
10/3/73	Letter to McDonough to set trial date.	This letter from AUSA Houlihan to notify McDonough of motion on October 9, 1973. <i>No reference to this motion appears in Appellant's Brief or Appendix.</i>
10/9/73	Return date of Motion to fix date for trial.	Clerk's Docket shows that the motion was made and that a trial date was fixed on November 13, 1973. The defendant did not appear, but was notified by letter and telephone as indicated in AUSA Houlihan's letter of October 10, 1973. <i>No reference to this motion appears in Appellant's Brief or Appendix.</i>
11/13/73	<i>Trial Date</i>	There is no correspondence that indicates what happened to interfere with this trial. However the Court's docket shows that the Government served subpoenas in preparation for this trial. The government has never requested a continuance in this case at all. Judge Burke's order of December

5, 1975 indicates that McDonough had at one time requested a continuance because of an extended sickness of Mr. Lane's wife, a necessary witness. The Government submits that this is the reason for the continuance here. Also, letter to Department of Justice on January 11, 1974 indicates a continuance was granted because of a sickness to a defense witness.

5/14/74 Notice of Readiness
filed.

5/28/74 Motion to Set
Trial Date.

There was no appearance for defendant. The court requested that the Government see if a trial could be held on June 3, 1974. This trial was not held. Although Mr. McDonough died on August 19, 1974, Mr. McDonough was sick and out of the office from early June, 1974. The Government was ready for trial.

6/3/74 *Trial Date*

8/19/74 Attorney Charles
McDonough Died

9/10/74 Government's motion
to Determine Defen-
dant's attorney.

No substitution of attorney was filed by the defendant. Thus, the Government was required to file a motion for determination of counsel.

10/15/74 Motion to Set
Trial Date.

Attorney Doyle appeared for Mr. Lane and advised that he would be ready in January 1975. Trial date to follow DiGaetano case and will be reached a little after January 15, 1975.

1/15/75 *Trial Date*

This date was set on the Government's motion returnable October 15, 1974.

10/14/75 *Trial Date*

This date was reached by telephone agreement with Mr. Doyle. The defense indicated that they were ready on that date

and it was confirmed by letter dated September 18, 1975.

10/15/75	Letter to Judge Burke.	Defendant again requests a continuance because of a trial commitment. Simultaneous with this request for a continuance the defendant moved to dismiss because of a denial of speedy trial rights. This motion was denied by order dated December 5, 1975.
11/3/75	<i>Trial Date</i>	Although October 15, 1975 letter from Doyle to Judge Burke indicated that Doyle would be ready after October 27, 1975, the defendant again requested a continuance from this date by letter dated October 28, 1975.
1/19/76	<i>Trial Date</i>	By letter dated December 19, 1975 Judge Burke scheduled this trial for January 19, 1976. The Government has never requested a continuance.
5/10/76	Government's Motion to Set Trial Date.	Trial fixed for June 1, 1976.
6/1/76	<i>Trial Date</i>	There is nothing to indicate why this trial did not take place. The Government has never requested a continuance in this case. Perhaps this was adjourned because of Judge Burke's illness. However, the transcript of May 10, 1976 indicates that the defendant would not be ready until <i>late</i> June, 1976.
10/14/76	Motion to Assign Judge	Due to the continued illness of Judge Burke, the Government moved to have a new judge assigned to hear this case. Judge Curtin had previously disqualified himself. Judge Elfvin was the U.S. Attorney while the Lane case was in the office. Therefore, only a visiting Judge could hear this case.
12/7/76	<i>Trial Date</i>	Judge Burke had recovered from his illness and was hearing cases again. Telephone call to Doyle's Office indicated that Doyle was

not available. See letter dated December 1976.

12/13/76	Government's motion to Set a Trial Date.	Trial fixed on December 21, 1976.
12/21/76	<i>Trial Held in Rochester</i>	
12/23/76	Jury Verdict — Guilty on three counts.	

POINT I

The defendant's speedy trial rights under the Constitution and applicable statutes and rules were not violated.

A. Pre-Indictment Period

Whether pre-indictment delay is so excessive as to violate a defendant's rights is governed by a few well-settled principles. The primary guardian of the defendant's rights is the statute of limitations, *U.S. v. Marion*, 404 U.S. 307, 322 (1971); *U.S. v. Ewell*, 383 U.S. 116, 122 (1966), which was enacted to protect against having to defend against stale criminal charges and to encourage the government to promptly investigate and indict suspected offenders, *Toussie v. U.S.*, 397 U.S. 112 (1970). This position was stated by this Court in *U.S. v. Vispi*, 545 F.2d 328 (2nd Cir. 1976).

The pre-prosecution delay neither deprived Mr. Lane of a speedy trial nor denied him due process.

In *U.S. v. Fineberg*, 383 F.2d 60, 64 (2nd Cir. 1967), this Court recognized that a delay before public accusation is usually less damaging and more easily justified than any subsequent delay. There is no claim here that the statute of limitations had passed. Contrary to Appellant's claims, there is no showing that the investigation took unusually long considering that the

criminal investigation began on September 20, 1968 and was completed on May 5, 1970. This is especially true in view of Mr. Lane's business activities and employment during the years 1965, 1966, and 1967. The 1967 delinquent tax return of Mr. Lane was not filed until August 16, 1969. The Government investigation had to verify all items of income and expenses for all three years in question.

Furthermore, delays were caused by the defendant taking advantage of his conference rights as late as December 16, 1971. (App. 3). He was indicted on February 17, 1972 only 2 months and 7 days after the Washington conference. Obviously, this period was used in attempting to dissuade the authorities from prosecuting him.

U.S. v. Marion, 404 U.S. 307, 323 (1971) clearly recognizes that "there is no need to press the Sixth Amendment into service to guard against the mere possibility that pre-accusation delays will prejudice the defense in a criminal case since the statute of limitations performs that function." *Marion* holds that it is either the formal indictment or else the actual restraints imposed by arrest and holding to answer a criminal charge that "engage the particular protections of the speedy trial provisions of the Sixth Amendment."

This Court decided this issue specifically in *U.S. v. Vispi*, 545, F.2d 328 (2nd Cir. 1976) holding that:

Mere investigation, unaccompanied by arrest or public charges, does not pose a sufficient interference with a person's liberty, resources, employment or relations with others to warrant constitutional protection (citations omitted.)

Appellant was not "arrested" prior to the indictment on February 17, 1972.

Neither the record, nor the Appellant's brief, lend support for a claim that the defendant was denied due process under the

Fifth Amendment. In this regard, there is no claim, much less proof, that the government used any delay as an intentional device to gain tactical advantage over the accused or that the defendant was actually prejudiced thereby. This, of course, would be required by this Court in order to support any claim of a due process violation. See: *U.S. v. Eucker*, 532 F.2d 249 (2nd Cir. 1976); *U.S. v. Finkelstein*, 526 F.2d (2nd Cir. 1975); *U.S. v. Singleton*, 460 F.2d 1148 (2nd Cir. 1972), *cert. denied*, 410 U.S. 989 (1973).

B. Post-Indictment Period

This case provides an excellent example of the defense tactic of delaying trial in order to postpone the consequences of a possible conviction, or to force the Government to try to persuade a jury to convict an accused of a crime committed ten years before.

While the *Speedy Trial Act* is necessary and important to assure an accused a prompt trial, it should not be used by a defendant as a weapon to obtain dismissal after a period of studied delay pursued by the defendant himself.

The Government concedes that most of the responsibility for a prompt trial should fall upon the prosecutor. However, it seems unfair to place complete responsibility on the Government, without any concurrent responsibility on the defendant to at least demand a prompt trial when it feels that the Government is unable or unwilling to go to trial after a reasonable period of time. Given the obvious institutional problems of not having sufficient trial judges, an increasing crime rate and caseload, and a limited number of prosecutors, the defendant should not be allowed to sit idly for a given period and obtain a dismissal solely because the trial was not held. Instead, the Court should require at least some activity by the defendant to assure his own rights to a speedy trial. This type of requirement is not unknown in the Federal Rules (i.e. Rule 16, *Fed. R.*

Crim. Proc.) and would prevent injustice in some cases where there is an overburdened Court or prosecutor. The adage that "the squeaky wheel gets the grease" may well apply in order to give fair interpretation to the Speedy Trial Act. Obviously, every case cannot be tried at the same time. However, if a defendant feels he wants a very prompt trial he should be required to put the Court and prosecutor on notice in some way other than by operation of law. In that way, the case could be given some priority over the other equally important cases also requiring a prompt trial. Cf. *Barker v. Wingo*, 407 U.S. 514 (1971).

This position is advanced to provide a reasonable control of a difficult situation. It is not offered to disclaim all Government responsibility under the Speedy Trial Act or the Sixth Amendment.

In this case, the Appellant has advocated his position in a manner totally misleading this Court as to the true circumstances involved. He has overstated his claims of Government delay; failed to cite meaningful examples of why the delays occurred; claimed a twenty month period of "protracted inactivity" that is unsupported by the record; cited this Court to an incomplete clerk's docket (Appellant App. A-20) which is materially different from the actual docket (App. 42-44) and generally has exceeded the bounds of reasonable appellate advocacy.

The Government answers the defendant's claims as follows:

- (a) The Government complied fully with the *Speedy Trial Act*, 18 U.S.C. §§3161-64; *The Second Circuit rules regarding prompt disposition of criminal cases*; the *Western District plan for prompt disposition of criminal cases*; *Rule 48(b) of the Federal Rules of Criminal Procedure*.

(1) *Speedy Trial Act*

The various provisions of the Speedy Trial Act dictate specific time limits within which a defendant must be tried. On analysis, the substance of 18 U.S.C. §3161 (b) and (g), when read in conjunction with §3163(a)(2), is that all indictments returned prior to July 1, 1976 must be tried within 180 days from July 1, 1976.

In this case, since the indictment was pre-July 1, 1976, the trial must have commenced prior to December 27, 1976. There is no question that this trial began on December 21, 1976 and was completed on December 23, 1976.

The Appellant does not claim nor could he prove a violation of the Speedy Trial Act. The Government has complied fully with this statute.

(2) *Second Circuit rules regarding prompt disposition of criminal cases*

Rule 4 of this Second Circuit plan provides, in pertinent part:

In all cases the government must be ready for trial within six months from the date . . . of a formal charge upon which the defendant is to be tried . . .

While the Appellant concedes that the Government moved ready for trial on several occasions after the indictment, he asserts that these were just "meaningless" notices and that the government was not "actually ready for trial until late 1976" (Appellant's Brief, p. 11-12). The appellant cites cases in support of his assertions that involve "Notices of Readiness". These cases are easily distinguishable from the situation here where the government actually moved the case for trial, rather than merely file a "notice of readiness".

In this case, the record clearly shows that the government first moved the case for trial within 33 days of indictment. In fact, in the 6 month period following indictment the Govern-

ment moved this case for trial on two separate occasions (March 22, 1972 and May 5, 1972) and two trial dates were actually fixed: (1) to follow docket number 1972-61, and (2) September 6, 1972 [fixed by letter July 28, 1972]. In each case a trial was set, Attorney McDonough requested an adjournment because of some other commitment. *See, generally, Statement of Significant Dates, Appellee Brief, supra.*

There can be no valid claim that the Government did not comply with the Second Circuit Rules for promptly disposing of criminal cases. This is true even without the need to exclude permitted delay authorized under the Rules.

(3) *Western District Plan for Prompt Disposition of Criminal Cases.*

This plan in the Western District of New York is identical to that of the Second Circuit. As such, even under a strict construction of these Rules, the Government submits that it is in full compliance with this plan. In this regard, the Government adopts its argument under I.B. (a)(2) of this brief.

(4) *Rule 48(b) Federal Rules of Criminal Procedure.*

Rule 48(b) of the Federal Rules of Criminal Procedure was designed to implement the right to a speedy trial. The rule is a mere restatement of the "inherent power of the court to dismiss a case for want of prosecution." Committee Note to Rule 48, 8A *Moore's Federal Practice* ¶48.01.

Rule 48(b) is merely a skeleton which the Speedy Trial rules "flesh out" giving content to its sweeping language "by substituting a precise, albeit still flexible, six month rule." *Hilbert v. Dooling*, 476 F.2d 355, 361 (2nd Cir, 1973).

Since Mr. Lane was afforded his right to a speedy trial as promulgated by the Second Circuit Rules and the Western District Plan, it follows that he received the right to a speedy trial guaranteed by Rule 48(b).

- (b) *The Government did not violate the Defendant's right to a speedy trial guaranteed by the Sixth Amendment.*

In *Barker v. Wingo*, 407 U.S. 514 (1971), the Supreme Court set out the criteria by which the Sixth Amendment right to a speedy trial is to be judged. In establishing the four factors to be weighed, the Court went on to say:

We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather they are related factors and must be considered with such other circumstances as may be relevant. *Barker v. Wingo* at 533.

It is respectfully submitted that under any tests, the Government did virtually everything it should have done to bring this case to trial. The Government never asked for a continuance for any reason, but was thwarted at every attempt to bring the defendant to trial prior to December 21, 1976. During the five years between indictment and trial the Government moved the case for trial nine times and trial dates were fixed or offered 14 times. On most occasions, except the last, the defendant or his attorney was unable to proceed to trial.

The delay should be specifically charged to this defendant. Although it must be readily apparent from the defendant's file that all adjournments were requested by the defense, the defendant claims that the government prevented him from receiving an early trial date.

Instead, he attempts to draw a striking parallel between this case and that of *U.S. v. Vispi*, 545 F.2d 328 (2nd Cir. 1976), but continues to ignore the distinguishing factors that *Vispi* requested a prompt trial and never requested any continuances.

The Appellant hired a very busy attorney to represent him, avoided trial repeatedly, and, following the death of Attorney McDonough in August, 1974, did not file a substitution of

attorney or notify the Court in any way until the Government made a motion in September, 1974 to determine his counsel. A realistic evaluation of the record is that the defendant did not want an early trial. Instead, he sought to postpone the consequences of a possible conviction or to force the government to trial on some date so far removed from the prosecution years of 1965, 1966 and 1967 that a jury might never convict on such an old charge. The defendant did not request a trial promptly and now claims the delay is the Government's fault. This argument is transparent.

The most outrageous statement of the Appellant is his position that there was a 20 month period of "protracted inactivity" between October 5, 1972 and May 14, 1974. This is totally incorrect. During this period trial dates were fixed or offered on October 10, 1972; November 6, 1972; January 3, 1973; October 9, 1973 and November 13, 1973. See, generally, *Statement of Significant Dates*, Appellee's Brief, *supra*. Furthermore, the government made a motion to fix a trial date on October 9, 1973; a trial was set for November 13, 1973, and at least one subpoena was served on November 2, 1973 (App. 43). In this regard, it is curious that Appellant's Appendix at page 20 [which is offered by him in support of this claim of "protracted inactivity"] seems to reproduce a complete page, but copies only a portion of the Clerk's docket eliminating the Clerk's reference to the government's motion and a fixed trial date (*Compare*: Appellant App. A-20 with Government's App. 43.)

The Appellant's Brief exaggerates, misrepresents and misleads to an extent that far exceeds both reasonable and unreasonable bounds of advocacy. Despite glowing examples of the defendant's delay and requests for continuances, the Appellant mildly concedes that he may be responsible for "some part" of the delay.

Nevertheless, in resolving this issue, this Court should consider the four factors enunciated in *Barker v. Wingo*: the length of the delay, the reason for delay, the defendant's assertion of his right and the prejudice to the defendant. See: *U.S. v. Roberts*, 515 F.2d 642, 645 (2nd Cir. 1975).

Length of Delay

The length of delay here was 58 months from indictment to trial. While this period certainly would trigger the inquiry under *Barker v. Wingo*, there are no particular circumstances in this case that would create constitutional infirmity. This time, although protracted, could not by itself be classified as *per se* excessive. In fact, the Courts have held that similar periods of delay do not violate the Sixth Amendment. See: *Barker v. Wingo*, 407 US 514 (1971) (65 months from indictment to trial); *U.S. v. Saglimbene*, 471 F.2d 16 (2nd Cir. 1972), *cert. denied*, 411 U.S. 966 (1973) (6 years from trial to indictment); *United States v. Fasanaro*, 471 F.2d 717 (2nd Cir. 1973) (four years).

Reason for Delay

This case is filled with repeated requests by the Government to set a trial date. Not only were motions made to set trial dates but it is obvious that numerous informal means were used to attempt to schedule this trial (See: generally, *Statement of Significant Dates*, Appellee's Brief, *supra*.)

The primary delay was caused by the defendant's repeated unavailability for trial, sickness of his necessary witness, death of his attorney and general unavailability of his subsequent attorney.

In addition, there was some institutional delay caused by the fact that two of the three active judges in this overburdened district recused themselves (App. 6); the unfortunate death of Chief Judge Henderson, and the illness of Judge Burke in 1975 and 1976. While it is true that institutional delays are

chargeable to the government, "they are not appropriately treated with the same severity as delays procured by the prosecution." *U.S. v. Roberts*, 515 F.2d 642 (2d Cir. 1975). In considering this issue in *Barker v. Wingo*, the Supreme Court said:

A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. 407 U.S. at 531.

While certainly the government can validly be charged with delay here, there is no way the government could reasonably be accused of not pushing this case for trial. In addition, there is no claim that the government sought a delay for any tactical advantage as in *U.S. v. Roberts*, 515 F.2d 642 (2d Cir. 1975). In fact, the Government was severely disadvantaged in that it was forced to try a case where the crime was committed 10 years before the trial.

Defendant's Assertion of His Rights

Although the defendant's claims that his prior statements that he was "ready for trial" is an assertion of his rights, this is clearly not true because the record is clear that, despite repeated offers for trial, the defendant requested the continuances.

It is shocking that the Appellant claims his motion to dismiss returnable October 14, 1975 was an assertion of his rights. That motion was made on the very date the Court had set for trial of this case and the defendant again requested a continuance. His second motion was made on the eve of the actual trial.

Certainly these are not the types of assertions that were contemplated by *Barker v. Wingo*.

Prejudice to the Defendant

The Appellant claims that he suffered a great deal of prejudice. He supports this claim, *not* with specific references within or without the record, but generally states that Mr. Lane is just like Mr. Vispi in *U.S. v. Vispi*, supra. The defendant has not shown actual prejudice. Instead, the record fully supports the fact that he suffered little, if any, actual prejudice.

In support of this position, the Government submits the following:

a. The defendant's reputation remained excellent at trial as attested to by his character witnesses. He did not suffer the personal prejudice that worried the Supreme Court in *Klopper v. North Carolina*, 386 U.S. 213 (1967).

b. Mr. Lane was relieved of a great deal of public scorn because the case was transferred to Rochester, out of sight of his friends and clients. All of the Government's motions were returnable in Rochester rather than Buffalo where they would be called in open court in front of other Buffalo attorneys and prospective clients. Indeed, Justice Doerr, a character witness and active trial judge, had "forgotten" about these charges against Lane. (Tr. 95-104).

c. There is no showing that any witness was lost to the Defendant.

d. There was no showing that the defense suffered any loss of records or dimmed memories. Surely, the record supports the fact that the defendant was represented by Mr. Walsh, the attorney of his choice during the investigation; that he was advised of the prospect of criminal charges as early as June 9, 1970 at the formal conference (Tr. 71-73); that, as an attorney, he knew of the effect of an I.R.S. investigation by the Intelligence Division or should have known when advised of his constitutional rights by Agent Kolb on September 20, 1968. (Tr.

56, App. 57) and had ample opportunity to obtain and keep appropriate records. Throughout the post-indictment period Mr. Lane was fully represented by very competent counsel. The issue of his wilfulness in failing to file had to be reviewed by Lane and his counsel much earlier than any period of delay.

e. The defendant was never incarcerated. Although there was certainly some psychological trauma which every defendant faces, it can hardly compare with the seriousness of the murder count faced by the defendant in the criminal case of *Barker v. Wingo*, *supra* where the Supreme Court found no violation of speedy trial rights.

f. There is nothing to indicate that the long pendency of the criminal charges had an adverse effect on his income. Indeed, a client of Mr. Lane indicated that he went back to Mr. Lane after 1970 and that Mr. Lane is functioning very well for him since that time. (Tr. 109-112, App. 91-94). Furthermore, Justice Doerr testified that he had "forgotten" about the charges. (Tr. 102-106, App. 83-87). Certainly if an active trial judge "forgot," the less sophisticated prospective clients of Mr. Lane surely would have forgotten.

g. Much of the pre-indictment delay was as a result of the defendant, with his attorney, attempting to dissuade the Government from prosecuting the case. His defense at these conferences was identical to his defense at trial.

h. There is no showing or claim that the delay was caused by the Government to gain any tactical advantage over the defendant as in *U.S. v. Roberts*, *supra*.

These and other factors should be considered by the Court in considering whether the defendant suffered any serious prejudice in this case.

Defendant's Motion to Dismiss

The defendant made two motions to dismiss based upon a denial of his rights to a speedy trial. In each motion, the defendant proffered almost identical arguments to those in this appeal. Each of these motions were denied by Judge Burke, District Court Judge in Rochester.

It is submitted that this Court should not overrule these decisions unless it is shown that Judge Burke was "clearly erroneous." Cf. *U.S. v. Maxwell*, 484 F.2d 1350 (1953). Given the fact that Judge Burke has been assigned to this case from the beginning and is familiar with the difficulty in obtaining a firm trial commitment from the defendant and his attorney, his decision should be given even more weight. Cf. *U.S. v. Leonard*, 524 F.2d 1076 (2nd Cir. 1975). He, of course, is in the best position to evaluate the situation as it unfolds rather than having to rely on an incomplete record with the clarity of hindsight.

Conclusion

This conviction should be affirmed in all respects.

Respectfully submitted,

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Johnson D. Hay/Publisher
Russell D. Hay/Board Chairman

June 3, 1977

The Daily Record

Re: United States of America vs. Robert J. Lane

State of New York)
County of Monroe) ss.:
City of Rochester)

Johnson D. Hay

Being duly sworn, deposes and says: That he is associated with The Daily Record Corporation of Rochester, New York, and is over twenty-one years of age.

That at the request of

Gerald Houlihan, Esq.
Assistant U.S. Attorney
Attorney(s) for

Appellee

On June 3, 1977

(s)he personally served three (3) copies of the printed ☐ Record ☒ Brief ☐ Appendix
of the above entitled case addressed to:

George P. Doyle, Esq.
Ellicott Square Bldg.
Buffalo, N.Y. 14203

☒ By depositing true copies of the same securely wrapped in a postpaid wrapper in a Post Office maintained by the United States Government in the City of Rochester, New York.

☐ By hand delivery

Sworn to before me this 3rd day of June 1977

Kathleen S. King

Notary Public

Commissioner of Deeds

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